91-1634

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

THE STATE OF FLORIDA,

Petitioner,

vs.

JEROME JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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QUESTION PRESENTED

IS AN INDIVIDUAL'S FLIGHT FROM AN IDENTIFIABLE LAW ENFORCEMENT OFFICER SUFFICIENTLY SUSPICIOUS IN AND OF ITSELF TO JUSTIFY A TEMPORARY INVESTIGATIVE STOP PURSUANT TO *TERRY v. OHIO, INFRA.*, AND *CALIFORNIA V. HODARI D., INFRA.*

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No. _____

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF FLORIDA,

Petitioner,

vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Second District is not reported. (Pet. App. A-1).

The trial court's order granting the motion of Respondent, Jerome Jones, to suppress evidence is not reported. (Pet. App. A-2 – A-4).

JURISDICTION

The District Court of Appeal of Florida, Second District's opinion was filed on January 10, 1992. This Court has jurisdiction. 28 U.S.C. § 1257(a). The District Court's decision was rendered without an opinion or citation and thus constitutes a decision from the highest state court empowered to hear the cause, and an appeal may be taken directly to this Court. Article V, Section 3(b)(3), Florida Constitution. *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 n. 3 (Fla. 1988).

CONSTITUTIONAL PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, Section I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person

or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent, Jerome Jones, was the Appellee in the District Court of Appeal of Florida, Second District. The facts of the case, as set forth in the trial court's order granting the motior to suppress, are as follows:

> This cause came before the Court on the Defendant's Motion to Suppress, and the Court having considered the testimony of the officers, the arguments of counsel and being otherwise advised in the premises, finds as follows:
>
> 1. On August 2, 1990, the Polk County Sheriff's Department received word from law enforcement officials in Dade County that two black males wearing green shirts would arrive in Winter Haven by train at approximately 12:30. The information went on to say that these individuals were suspected of narcotics possession inasmuch as they had met the drug courier profile.
>
> 2. Officers of the Polk County Sheriff's Department went to the train station in Winter Haven and awaited the arrival of the train at 12:26 P.M. The defendant and another black male got off the train matching the description given to them by the Dade County officials. The officers approached the defendant and his companion and identified themselves as law enforcement officers. They asked the individuals if they could talk with them and the defendant agreed. The defendant and his companion walked with the officers over to the side to a bench.
>
> 3. The officers asked the defendant for permission to search the luggage the defendant had in his hand. The defendant agreed and handed the

> luggage over to the officer for a search. The officer found nothing during the search.
>
> 4. Officer Hellman then observed to the other officer, "Maybe we should search them". Upon hearing this the defendant took off running. The officers chased the defendant, tackled him, and after a brief struggle, a nine millimeter handgun fell from the waistband of the defendant's pants. The officers sprayed the defendant in the face with a mace-like substance to control him. The officers then handcuffed the defendant and arrested him for carrying a concealed firearm. During a search of the defendant subsequent to the arrest, the officer found the controlled substances.

(Pet. App. A-2 – A-4). The trial court found that the officers did not have the necessary suspicion to initially justify the stop of the Respondent. (Pet. App. A-3). The State agreed that reasonable articulable suspicion was lacking to support the stop, but instead asserted that the initial contact was a voluntary police-citizen encounter not regulated by the Fourth Amendment and that the search of the Respondent's luggage was a result of a valid consent. The State then asserted that the Respondent's flight from the officer, after hearing one officer suggest to the second officer that a search of the person might be prudent, was sufficiently suspicious in and of itself to justify the stop. (Pet. App. A-3).

The trial court agreed with the State that the initial contact between the police and Respondent was a voluntary police-citizen encounter and that the resultant search of the Respondent's luggage was pursuant to a valid consent. (Pet. App. A-4). However, the trial court rejected the State's argument that flight during a consensual encounter, was sufficiently suspicious in and of itself to justify the subsequent stop.

> ...However, it is also clear that involved in any such encounter, the citizen has the right to leave the officers at any time. In other words, the citizen does not have to stop for the encounter, and if he does, he has the right to leave at any time. When the defendant exercised his right to leave, the State then claims that now this raises the reasonable suspicion which would justify the further stop. This Court is not satisfied that although the defendant's choosing to leave as he did might cause the officers to have a "hunch", that the same will give rise to well-founded suspicion that would justify the stopping of the defendant, especially inasmuch as the suspected luggage had been searched and nothing had been found....

(Pet. App. A-4). The trial court then granted Respondent's motion to suppress. (Pet. App. A-4).

The State appealed this decision to the District Court of Appeal of Florida, Second District. That court per curiam affirmed, without an opinion or legal citation, the trial court's suppression of the evidence. (Pet. App. A-1).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT FLIGHT FROM AN IDENTIFIABLE LAW ENFORCEMENT OFFICER IS NOT SUFFICIENTLY SUSPICIOUS IN AND OF ITSELF TO JUSTIFY A *TERRY* STOP CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL AND DECISIONS OF APPELLATE COURTS OF OTHER STATES.

After Respondent and his companion disembarked from the train at Winter Haven, Florida, they were approached by the police officers. The officers identified themselves as law enforcement officers and asked Respondent if he would be willing to speak with the officers. The Respondent agreed and he walked with the officers to an area outside the flow of pedestrian traffic. During the conversation, the officer asked for and received permission to search Respondent's luggage. When the search of the luggage did not reveal narcotics, one officer said to the other officer, "Maybe we should search them." Upon overhearing this statement, Respondent, while the officers still had possession of his luggage, took off running. The officers then chased him and eventually stopped Respondent. As a result of the stop, the Respondent was arrested for trafficking in cocaine and carrying a concealed firearm. The trial court suppressed the cocaine and the firearm finding that Respondent's flight during the course of a consensual police-citizen encounter was not sufficiently suspicious in and of itself to provide the necessary reasonable and articulable suspicion for a valid investigatory stop.

This holding, based on an erroneous interpretation of what constitutes reasonable articulable suspicion to justify a stop, resulted in an overly restrictive misapplication of the

law to the facts herein. The proper interpretation is that flight from police, after an initial consent to search and before any pursuit by the police, provides a reasonable and articulable suspicion justifying an investigatory stop.

In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) this Court, for the first time, permitted police to stop citizens with less than probable cause that criminal activity is afoot. *Terry* held that a law enforcement officer is entitled to stop an individual on the street to investigate suspicious behavior if the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21. The officer may not rely on "mere suspicion" or a "hunch" to justify the stop, but due consideration is afforded specific reasonable inferences the officer is entitled to draw in light of his law enforcement experience. *Id.* at 27. Subsequent cases have named the lesser standard of knowledge required for a *Terry* stop "reasonable suspicion" and have gauged the reasonableness of particular investigative stops by striking a balance between the public interest [behind the investigation] and the individual's right to personal security free from arbitrary interference from law officers. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Where the public interest served by the officer's investigation is great and the intrusion on individual privacy is small, investigative stops of limited duration and "reasonably related in scope to the justification for their initiation" are to be upheld. *Id.* at 881.

The Court has yet to address the specific issue raised herein, whether flight from a clearly identified law enforcement officer may, in and of itself, furnish sufficient ground for a limited investigative stop. However, the Court has intimated that flight alone can be the basis for an investigatory stop.

In *California v. Hodari D.*, 499 U.S. ____, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) this Court held that cocaine abandoned by a youth fleeing a police officer was not the fruit of a seizure within the meaning of the Fourth Amendment where the officer had not touched the youth at the time the cocaine was discarded. This Court suggested that flight alone can provide the reasonable suspicion necessary to justify the stop.

> *California* conceded below that Officer Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari. See *Terry v. Ohio,* 392 U.S. 1 (1968). That it would be unreasonable to stop for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See *Proverbs* 28:1 ["The wicked flee when no man pursueth"]. We do not decide that point here, but rely entirely upon the State's concession.

Id. at 695, n. 1.

In the instant case, the Respondent fled not upon the mere sighting of the police as in *Hodari D.,* but during the course of a consensual police-citizen encounter. The flight occurred after the Respondent was informed of the purpose of the stop and that he did not have to submit to police authority. Only after he voluntarily consented to have his luggage searched and after overhearing the officers' desire to search his person, did he flee. The State submits that since *Hodari D.* permits a police officer to pursue a suspect when he flees, the same officer must additionally be permitted to briefly stop that fleeing suspect in order to ascertain why he fled. If the reasons for flight sufficiently allay the officer's fear that criminal activity is afoot, the suspect would be free to leave. See also *Michigan v. Chesternut,* 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) (Kennedy, Scalia, JJ,

concurring) (Concurrence would hold that unprovoked flight gives the police ample cause to stop a defendant).

The District Court of Appeal of Florida, Second District, could not follow the logic of allowing the officer to pursue an individual who flees upon the sight of police and then expanding it to allow for the stopping of said individual to ascertain why he ran away. Rather the court, agreeing with the trial court, found it was most logical to permit an individual to flee police without having to worry about being detained until an actual crime is committed. This holding is in direct conflict with *Terry* and its progeny.

The decision below also expressly conflicts with decisions of the United States Courts of Appeal on this issue. It also conflicts with decision of appellate courts of other states.

In *United States v. Pope,* 561 F.2d 663 (6 Cir. 1977) the defendant was found to fit the drug courier profile. After observing the defendant's activities for a period of time, the police officer approached the defendant and displayed his credentials. The defendant immediately bolted past the officer and fled. The officer gave chase, and eventually stopped the defendant and seized heroin and methadone. The court, in affirming the denial of the motion to suppress, found that the defendant's conduct up until his flight was consistent with entirely innocent behavior and had a *Terry* stop occurred then, it would have been without founded suspicion. However, the court found that fleeing a police officer who merely approaches and identifies himself is not consistent with innocent behavior and therefore flight alone was sufficient to establish reasonable suspicion.

> We conclude that Appellant's flight in the face of a clear showing of lawful authority supplied the agent with grounds to reasonably suspect that Appellant was engaged in criminal activity. Flight invites pursuit and colors conduct which hitherto

has appeared innocent. Under the circumstances, the agent acted reasonably in pursuing Appellant.[5] We wish to emphasize the narrowness of this holding. We do not condone, nor do we wish to encourage, investigative stops of citizens on a public street on fact which do not meet the standards in *Terry*. All that we hold today is that flight from a clearly identified law enforcement officer may furnish sufficient ground for a limited investigative stop.[6] *See United States v. Vasquez,* 534 F.2d 1142, 1145 (5th Cir. 1976); *United States v. Rundel,* 461 F.2d 860, 863-64 (3d Cir. 1972). *Accord, City of St. Paul v. Vaughn,* 237 N.W.2d 365 (Minn. 1975). *Cf. United States v. Williams,* 314 F.2d 795, 798 (6th Cir. 1963)....

---

5 If the agents had apprehended Appellant without further incident, the stop and inquiry would have had to be "reasonably related in scope to the justification for their initiation," in this case the flight from the agents. *Terry v. Ohio,* 392 U.S. at 29, 88 S.Ct. at 1884. A brief detention for questioning would be a reasonable response to Appellant's flight from the agents, particularly in light of the serious public interest in stemming illegal drug traffic balanced against the minimal intrusion of a brief investigative stop. *See United States v. Brignoni-Ponce,* 422 U.S. at 878-82, 95 S.Ct. 2574. Probable cause would of course be required before an arrest could be made. *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

6 In *Wong Sun v. United States,* 371 U.S. 471, 482-84, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962), the Supreme Court rejected a Government contention that a suspect's "flight [from a narcotics agent] justified an inference of guilt sufficient to generate probable cause." *Id.* at 483 n. 10, 83 S.Ct. at 415. The Court stressed that the agent affirmatively misrepresented his reason for being on the premises, that the misimpression engendered by the agent's ruse was not adequately dispelled before the suspect fled, that the agent was not certain he had the correct man, and that the agent's uninvited entry into the suspect's living quarters was unlawful. *Id.* at 483-84, 83 S.Ct. 407. Under these circumstances, the *Wong Sun* Court held that the suspect's flight and refusal to admit the agent into his bedroom was "ambiguous" conduct which "signified guilty knowledge no more clearly than did a natural desire to repel an apparently unauthorized intrusion." *Id.* at 483, 83 S.Ct. at 415. In this case, by contrast, Agent Johnson clearly identified himself as a federal agent as he approached Appellant on the street. He was accompanied by a uniformed officer. This is not a case, as in *Wong Sun,* where there could be any confusion about the agent's identity or the official nature of his mission. Flight under these circumstances was not ambiguous conduct. The agent was entitled to infer, in light of his law enforcement experience, that Appellant was engaged in some sort of furtive venture. In *Sibron v. New York,* 392 U.S. at 66, 88 S.Ct. at 1904, the companion case to Terry, the Supreme Court expressed similar sentiments in discussing flight and other furtive gestures as they relate to

> probable cause to arrest: "...deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to evidence of a crime, they are proper factors to be considered in the decision to make an arrest." Flight from an identified law enforcement officer may also satisfy the lesser standard required for an investigative stop. *See, e.g., United States v. Rundel,* 461 F.2d at 864.

Id. at 668-669.

In *United States v. Haye,* 825 F.2d 32 (4 Cir. 1987), the defendants, upon arrival at Washington National Airport on a flight from Miami, Florida, drew the attention of a Drug Enforcement Administration Agent. Because the defendants exhibited some of the characteristics of the drug courier profile, the officers approached the defendants just as they were leaving the terminal. The officers then exhibited their credentials and announced that they were police, whereupon the defendants bolted and ran in different directions. The officers chased the defendants, who were subsequently detained and arrested for possession of cocaine. The trial court granted the defendants' motion to suppress on the grounds that there was no probable cause for the arrest because the drug courier profile did not give the police reasonable suspicion for a *Terry* stop and therefore the subsequent admission that they had cocaine was inadmissible. After agreeing that the drug courier profile did not provide the necessary founded suspicion, the Fourth Circuit reversed, holding the defendants' flight upon being approached by identifiable police officers was alone sufficiently suspicious to permit a limited, investigative stop.

In *United States v. Cardona-Rivera,* 904 F.2d 1149 (7 Cir. 1990), the defendant was seen conversing with a known drug dealer. Thereafter an officer approached the defendant, identified himself as a police officer and asked to speak with the defendant. The defendant then bolted but was unable to run away. The court, in upholding the denial of the motion to suppress the cocaine, held the detention in light of the flight, was justified.

In *Commonwealth v. Sanchez,* 403 Mass. 640, 531 N.E.2d 1256 (1988), the defendant upon arrival at Logan Airport was engaged by police in a consensual encounter. After identifying himself, the officer asked if he could speak with the defendant. The defendant agreed and the officer then told him that he was a narcotics investigator and requested permission to search the defendant for narcotics. He also told the defendant that he was not obliged to submit to the search. The defendant agreed to a search provided that it could be done in private. They agreed to conduct the search in a nearby men's room and while in route the defendant bolted and fled. The officer pursued him and subsequently stopped and arrested him for possession of heroin. The Supreme Judicial Court of Massachusetts in affirming the denial of the motion to suppress, held that if a defendant flees after having consented to a search, the officers are justified in pursuing him for the purpose of subjecting him to an initial investigatory inquiry. The court held that the flight was the suspicious conduct which gave the officer reason to suspect that a person has committed, is committing, or is about to commit a crime. The defendant contended that his flight could not justify the detention because it was caused by the police. In rejecting the contention the court found:

> The defendant relies on *Commonwealth v. Thibeau,* 384 Mass. 762, 429 N.Ed.2d 1009 (1981), for the proposition that "the defendant's flight from the officer's pursuit cannot be considered" to

> justify the investigatory stop. *Id.* at 764, 429 N.E.2d 1009. The defendant's reliance is misplaced. In *Thibeau,* we said that "a stop starts when pursuit begins." *Id.* Because the police in that case began pursuing the defendant before he fled, they could not use his subsequent flight to justify the stop. Here, however, the defendant broke away from the police before they pursued him, thus providing the police with a reasonable and articulable suspicion before the stop. Also, here the defendant's actions caused further suspicion because he fled after an initial consent to a search. In *Commonwealth v. Thibeau,* there had been no initial conversation between the police and the defendant, and certainly no consent to a search.

531 N.E.2d at 1259-1266.

In *State v. Anderson,* 155 Wis.2d 77, 454 N.W.2d 763 (1990) the police observed the defendant's car and proceeded to drive towards him in order to speak with the defendant about a previous parking problem. The defendant upon seeing the squad car approach, drove off in an evasive manner. After the officers activated their flashing light, the defendant immediately stopped. After the stop and upon further investigation, the defendant was arrested for possession of a firearm by a convicted felon and carrying a concealed firearm. The trial court denied the motion to suppress. However, the intermediate appellate court reversed, finding that the stop of the defendant's car was an improper *Terry* stop. The Supreme Court of Wisconsin reversed the decision of the intermediate appellate court and concluded that the defendant's flight from the police was sufficient in and of itself to justify a temporary stop to further investigate. In so holding the Court reasoned:

> Flight at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, "[i]t would have been poor police work indeed for an officer...to have failed to investigate this behavior further." *Terry,* 392 U.S. at 23, 88 S.Ct. at 1881.
>
> . . . .
>
> A stop under these circumstances does not represent the "inchoate and unparticularized suspicion or 'hunch'..." condemned in *Terry. See Terry,* 392 U.S. at 27, 88 S.Ct. at 1883. Rather, it furnishes an affirmative answer to the question in *Terry:* whether a reasonably prudent person in the circumstances of the officer would be warranted in the belief that the action taken was appropriate. *Id.* at 21-22, 88 S.Ct. at 1879-80.

454 N.W.2d at 766-767.

As the foregoing decisions evidence, the appellate courts that have reached the question, have held that flight from clearly identifiable police officers is sufficient in and of itself to justify a temporary stop to investigate further. The stop initially would be limited to a brief detention to determine the reason for the flight. This holding is a logical extension of *California v. Hodari D.,* which permits an officer to pursue a suspect who flees at the sight of the police. To allow pursuit

but not detention would inhibit the ability of the police to detect criminal activity. The instant decision, which holds that flight alone is insufficient to justify a *Terry* stop, takes an unrealistic and simplistic approach to law enforcement and therefore this case warrants consideration by this Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, THE STATE OF FLORIDA, respectfully requests that this Court grant its Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District.

Respectfully submitted,

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No. _____

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Supreme Court of the United States
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THE STATE OF FLORIDA,

Petitioner,

vs.

JEROME JONES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

APPENDIX

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Order Granting Motion to Suppress A-2

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

CASE NO. 90-03717

STATE OF FLORIDA,

Appellant,

v.

JEROME JONES,

Appellee.

Opinion filed January 10, 1992.

Appeal from the Circuit Court
for Polk County;
Charles A. Davis, Jr., Judge.

Robert A. Butterworth,
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Katherine B. Johnson,
Assistant Attorney General, Miami,
for Appellant.

James Marion Moorman, Public Defender,
and Timothy J. Ferreri, Assistant Public Defender,
Bartow, for Appellee.

PER CURIAM.

Affirmed.

SCHOONOVER, C.J.,and DANAHY and THREADGILL, JJ., Concur.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

CASE NO. CF90-3494A1-XX

STATE OF FLORIDA,

Plaintiff,

vs.

JEROME JONES,

Defendant.

ORDER GRANTING MOTION TO SUPPRESS

This cause came before the Court on the Defendant's Motion to Suppress, and the Court having considered the testimony of the officers, the arguments of counsel and being otherwise advised in the premises, finds as follows:

1. On August 2, 1990, the Polk County Sheriff's Department received word from law enforcement officials in Dade County that two black males wearing green shirts would arrive in Winter Haven by train at approximately 12:30. The information went on to say that these individuals were suspected of narcotics possession inasmuch as they had met the drug courier profile.

2. Officers of the Polk County Sheriff's Department went to the train station in Winder Haven and awaited the arrival of the train at 12:26 P.M. The defendant and another black male got off the train matching the description given to them by the Dade County officials. The officers approached the defendant and his companion and identified themselves as law enforcement officers. They asked the individuals if they could talk with them and the defendant agreed. The

defendant and his companion walked with the officers over to the side to a bench.

3. The officers asked the defendant for permission to search the luggage the defendant had in his hand. The defendant agreed and handed the luggage over to the officer for a search. The officer found nothing during the search.

4. Officer Hellman then observed to the other officer, "Maybe we should search them". Upon hearing this the defendant took off running. The officers chased the defendant, tackled him, and after a brief struggle, a nine millimeter handgun fell from the waistband of the defendant's pants. The officers sprayed the defendant in the face with a mace-like substance to control him. The officers then handcuffed the defendant and arrested him for carrying a concealed firearm. During a search of the defendant subsequent to the arrest, the officer found the controlled substances.

5. It is clear that the officers did not have the necessary suspicion to stop the defendant based upon the "drug courier profile". There was no testimony by the Dade County authorities that would justify such a stop.

6. The State suggests that the officers had a well-founded suspicion justifying the stop of the defendant inasmuch as the defendant's attempting to leave the officers raised the necessary suspicion in their mind that the defendant was involved in criminal activity. Specifically, the State asserts that the officers made a police-citizen encounter with the defendant which resulted in the consensual search of the luggage. The defendant's running from the officers after hearing one officer indicate that they were going to now search their person raised the suspicion of the officer's mind which, according to the State's argument, justified the stop.

7. It is clear that the initial contact between the defendant and the officers was a police-citizen encounter. It is further

clear that the search of the luggage was pursuant to consent given by the defendant. However, it is also clear that involved in any such encounter, the citizen has the right to leave the officers at any time. In other words, the citizen does not have to stop for the encounter, and if he does, he has the right to leave at any time. When the defendant exercised his right to leave, the State then claims that now this raises the reasonable suspicion which would justify the further stop. This Court is not satisfied that although the defendant's choosing to leave as he did might cause the officers to have a "hunch", that the same will give rise to well-founded suspicion that would justify the stopping of the defendant, especially inasmuch as the suspected luggage had been searched and nothing had been found. It is, therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress should be and is hereby GRANTED.

DONE AND ORDERED in chambers at Bartow, Polk County, Florida, this 20th day of December, 1990.

/s/ Charles A. Davis, Jr.
CHARLES A. DAVIS, JR.
Circuit Judge

Copies furnished to:

State Attorney (Bergdoll)
Public Defender (Maslanik)

Case No. 91-1634

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF FLORIDA,

Petitioner,

vs.

JEROME JONES,

Respondent.

RECEIVED
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PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

IS AN INDIVIDUAL'S FLIGHT FROM IDENTIFIABLE LAW ENFORCEMENT OFFICERS SUFFICIENTLY SUSPICIOUS IN AND OF ITSELF TO JUSTIFY A TEMPORARY INVESTIGATIVE STOP PURSUANT TO TERRY V. OHIO, INFRA., AND CALIFORNIA V. HODARI D., INFRA.

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JURISDICTION OF THE SUPREME COURT

Respondent accedes this Court has jurisdiction to hear this case.

STATEMENT OF THE CASE

For the limited purpose of this Court considering the issues raised in the Petition for Writ of Certiorari by Petitioner State of Florida, the Statement of the Case in that Petition may be accepted with the following exceptions:

On January 28, 1992, the Court of Appeals for the Second District of Florida issued its mandate. The Assistant State Attorney filed a notice of nolle prosequi on February 18, 1992, stating that as the evidence was suppressed there was insufficient evidence to prosecute.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT DID NOT ERR IN FINDING THE RESPONDENT'S FLIGHT FROM POLICE OFFICERS DID NOT GIVE THE OFFICERS REASONABLE SUSPICION TO DETAIN THE RESPONDENT.

The Florida Second District Court of Appeals gave no reason for affirming the trial court's granting of Respondent's motion to suppress. The general rule in Florida is the trial court's decision will be affirmed, even if the decision is based on erroneous reasoning, when the evidence or another theory supports it. Caso v. State, 524 So.2d 422 (Fla. 1988), cert. den. 488 U.S. 870, 109 S.Ct. 178, 102 S.Ct 178 (1988), Belvin v. State, 585 So.2d 1103 (Fla. 2d DCA 1991). This Court has ruled that, in the absence of exceptional circumstances, it would defer to state court factual findings, even when those findings relate to constitutional issues. The test would be whether the findings of the Polk County trial court were clearly erroneous if at all. Hernandez v. New York, 500 U.S.__, 111 S.Ct.__, 114 L.Ed.2d 395 (1991).

Florida courts have held that flight from an approaching officer, even in a high-crime area, without more, does not give rise to a founded suspicion and does not justify a stop and frisk. Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989); Johnson v. State, 547 So.2d 699 (Fla. 1st DCA 1989); Daniels v. State, 543 So.2d 363 (Fla. 1st DCA); Hill v. State, 561 So.2d 23 (Fla. 3d DCA 1990); Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990). The trial court found the stop of Respondent at a train station was a police citizen encounter. As the Respondent was free to leave at

any time, the Respondent's decision to exercise that right should not have been used to give the officers a reasonable suspicion to then stop the Respondent. Further a person has a right under Florida law to flee from an officer who is attempting to make an illegal arrest. Under section 843.02, Florida Statutes (1991), an officer must be engaged in the lawful execution of his lawful duty to arrest a person for resisting arrest without violence (fleeing). The Petitioner has stipulated this is a consensual encounter, and the officers did not have an well-founded suspicion of criminal activity to stop the Respondent. If an officer has no suspicion a person has committed, was committing, or was about to commit a felony or misdemeanor, the person would not be guilty of resisting arrest without violence or fleeing an officer. F.E.C. v. State, 559 So.2d 413 (Fla. 2d DCA 1990).

Respondent would argue the findings of the trial court are not clearly erroneous. As this was a consensual encounter, the Respondent did not have to talk to the police, and could have left at any time. If this only was a consensual encounter, Respondent had a right to refuse to talk to the officers and leave. The Petitioner is seeking to penalize the Respondent for exercising his right to leave. Respondent had 3 choices: (1) he could have consented to the search of his person, (2) he could have stayed and refused consent, or (3) he could have left the scene. Respondent contends choices 2 and 3 are the same but are just different means of refusing consent. The State of Florida argues that guilt can be assumed from flight. If a guilty mind can be inferred from flight

from police officers, can the same guilt be inferred from refusing to consent to a search? The State of Florida's reasoning would say yes, but it would allow a Terry stop whether a defendant left or stayed without a founded suspicion during a consensual encounter.

The Petitioner argues an individual's flight from an identifiable law enforcement officer in and of itself justifies a temporary investigative stop. Petitioner believes this is a logical extension of the Court's decision in California v. Hodari D., 499 U.S. __, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). In the case of Hodari D., supra, police officers chased juveniles who fled on their approach. The limited holding of this court was that Hodari D. was not seized (touched) so the drugs dropped by Hodari D. were not the fruits of a seizure. The issue was the seizure of the dropped drugs and not the seizure of the person. The court did not address the point whether it would be unreasonable for the police to stop young men who scatter on the mere sighting of police. The facts in Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1986) are somewhat similar as the drugs dropped by the defendant, while being chased by police, were held improperly suppressed as there was no "seizure" of the defendant. The court in Chesternut expressly declined to hold the act of fleeing constituted a reasonable suspicion to justify a seizure.

Petitioner cites several cases involving flight from law enforcement officers. No case, with only one exception, directly holds flight in and of itself gives an officer a right to make an investigative stop on a person. In United States v. Pope, 561 F.2d

663 (6th Cir. 1977), the defendant was being chased by DEA agents when he threw a white bag in a sewer and swung a briefcase at one of the agents. The case is more akin to Hodari D. and Chesternut.

In United States v. Haye, 825 F.2d 32 (4th Cir. 1987), the court held the defendant's meeting some type of drug courier profile **combined with** his flight gave police reasonable, articulable suspicion, based upon articulable facts to make a Terry stop. In United States v. Cardona-Rivera, 904 F.2d 1149 (7th Cir. 1990), the Appellant had been seen in a conversation with a drug dealer and had delivered a shopping bag to the same address. The Appellant fled when the officers approached to question him on the above facts. The court held the officers had an articulable suspicion of criminal activity when they approached the Appellant unlike this case.

In Commonwealth v. Sanchez, 531 N.E.2d 1256 (Mass. 1988), the court held when a defendant flees after consenting to a search, the officers are justified in subjecting the him to a initial investigatory inquiry. Respondent did consent to the search of his baggage, but did not consent to the search of his person. As the stop was a consensual encounter, the Appellant was free to leave. In State v. Anderson, 454 N.W.2d 763 (Wis. 1990), the trial court found the defendant, who was known to the police, had attempted to evade the officers. The court held the "situation 'called for investigation' and that the officers handling of the situation was 'appropriate police work.'" The court held, "that behavior which evinces in the mind if a reasonable police officer an intent to

flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by police." Anderson, 454 N.W. 2d at 768. The police had received complaints that Anderson was parking in private business stalls. The officer testified he stopped Anderson's vehicle because of the parking situation and the suspicious behavior of Anderson's driving. The Wisconsin Supreme Court in the above decision concluded Anderson's driving constituted flight although the trial court never made such a specific finding. Anderson, at 765. The Anderson case did not involve a consensual encounter.

CONCLUSION

The Florida Court of Appeals correctly deferred to the fact finding of the trial court which granted the motion to suppress. Under Florida law the Respondent had a right to leave; and that right to leave should not be used for a basis to stop the Respondent. As the findings of the trial court are not clearly erroneous, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Member of the Bar of the
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TJF/lw

CASE NO.: 91-1634

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JEROME JONES, Petitioner,

v.

STATE OF FLORIDA, Respondent.

CERTIFICATE OF SERVICE

I, DEBORAH K. BRUECKHEIMER, a member of the Bar of this Court, hereby certify that on this 16th day of June, 1992, one copy of the Petition for Writ of Certiorari, one copy of the Motion for Leave to Proceed In Forma Pauperis were mailed to Michael A. Neimand, Assistant Attorney General, Suite 700, 2002 North Lois Avenue, Tampa, FL 33607, counsel for respondent. I further certify that all parties required to be served have been served.

Deborah K. Brueckheimer

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